In the United States

Circuit Court of Appeals

For the Ninth Circuit

CORNELIUS C. WATTS, et al.,
Appellants,

—vs.—

JOSEPH E. WISE and MARGARET W. WISE,
Appellees.

No. 2719.

BRIEF FOR JOSEPH E. WISE AND MARGARET W. WISE, APPELLEES, ON THE 1-19 INTEREST OF THE HEIRS, ETC., OF ANTONIO BACA.

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STATEMENT OF THE CASE

This is a suit to quiet title brought by Cornelius C. Watts and Dabney C. T. Davis, Jr., as plaintiffs, against all the defendants.

The court decreed title to an undivided 1-38 interest

to be in defendant Joseph E. Wise; 1-38 interest in Margaret W. Wise; 18-19 interest in the south half in plaintiffs, and 18-19 interest in the north half in defendants Bouldin.

The defendants Joseph E. Wise and Lucia J. Wise, his wife, have appealed from this decree. The plaintiffs, Watts and Davis, and defendant Bouldin have appealed from that portion which adjudges Joseph E. Wise and Margaret W. Wise to be the owners each of an undivided 1-38 interest, or a total of 1-19 interest in the tract in dispute. The defendant Santa Cruz Development Company has also appealed.

Joseph E. Wise, upon his appeal, has heretofore filed a brief as to the 18-19 interest in the entire tract, decreed to plaintiffs and Bouldins. He now files this brief for himself and Margaret W. Wise, as to the 1-19 interest decreed to them, and he asks that this brief be considered as being filed both in his own appeal, and also as a reply brief to the brief filed by plaintiffs, Bouldins and Santa Cruz Development Company, in the matter of their appeals, which involve the title to this 1-19 interest.

The tract in dispute was granted by Congress to the heirs of Luis Maria Baca.

The tract of land in dispute was granted by Act of Congress of June 21, 1860, (12 Stat. at L. 71, Chap. 167) to the heirs of Luis Maria Baca. Luis Maria Baca died in New Mexico in 1827, leaving a will, dated May, 1827.

On September 12, 1827, Jose Miguel Baca, brother of the deceased, executor under the will, presented the same to the governor of the Territory of New Mexico, in the then Republic of Mexico, for probate, and on that day, the governor declared the same to be valid. The petition and order validating the will, and the will itself, are all in one document, Defendants Wise Exhibit 39, Tr. p. 345-442.

The petition of the executor to the Governor, which is annexed to the will, Wise Exhibit 39, Tr. 448, states that Francisca Garviso, who was the wife of a son of the deceased, wished to participate in the property with the other heirs. The order of the Governor thereon, (Tr. p. 452), directs the Alcade of Cochite to hear the matter, "with the understanding that if anything was given in the lifetime of her deceased husband shall be deducted from what was coming to him by the death of his father." This ancient document, therefore, conclusively established the fact that Luis Maria Baca had a son who died **before** he did, and that Francisca Garviso was the widow of this deceased son.

The plaintiffs introduced in evidence a petition filed with the Surveyor General of New Mexico in the year 1860, by John S. Watts, as attorney for certain heirs of Luis Maria Baca, wherein he asked for the confirmation of the Ojo del Espiritu Santa Grant, Plaintiffs' Exhibit E, Tr. p. 165.

In this petition John S. Watts, amongst other things, says:—

"Your Petitioners further state that at the death of the said Luis Maria Cabeza de Baca, **he left surviving him as his heirs,** the following children, to wit: (1) Luis Baca, (2) Prudencio Baca, (3) Jesus Baca, Sr., (4) Jesus Baca, Jr., (5) Felipe Baca, (6) Domingo Baca, (7) Manuel Baca, (8) Josefa Baca y Salas, (9) Josefa Baca y Sanchez, (10) Juan Antonio Baca, (11) Jose Baca, (12) Jose Miguel Baca, (13) Ramon Baca, (14) Matio Baca, (15) Guadalupe Baca, (16) Altagracia Baca, (17) Rosa Baca, (18) Juana Paula Baca." Tr. p. 167.

This statement on the part of John S. Watts, as attorney for the heirs, made in 1860, is **that the said Luis Maria Baca left eighteen children surviving him.** As the will of Baca showed that Luis Maria Baca had one son who died before he did, he must have had nineteen children; of whom, as stated in the petition of Watts, eighteen survived him; and, as stated in the will, one died before he did. The question of fact was then presented upon the trial, as to who the nineteenth son was, who died before his father, leaving a widow by the name of Francisca Garviso.

Joseph E. Wise and Margaret W. Wise produced evidence which proved that the name of this son was Antonio Baca; that this Antonio Baca left a son by the name of Juan Manuel Baca; that this Juan Manuel Baca died leaving a son, Jose Baca, and a daughter, Preciliana Baca, both of whom were dead, and whose heirs conveyed all their interest in the lands in question, by

mesne conveyances, to said Joseph E. and Margaret W. Wise.

The lower court, finding as a fact that Antonio Baca was the son who died before his father, leaving heirs who had conveyed all their interest to JosephE. and Margaret W. Wise, rendered its decree adjudging the 1-19 interest of the heirs of this son Antonio, to be owned in fee by Joseph E. and Margaret W. Wise.

Plaintiffs, the Bouldins and Santa Cruz Development Company, have each appealed from this part of the decree. They each attack it on two grounds, to wit:

(1) That defendants Wise wholly failed to prove there was a son and heir named Antonio Baca.

(2) That if there was such a son, neither he nor his heirs, derived any title under the Act of June 21, 1860.

The first point requires a consideration of the evidence in the case; the second point involves the construction of the Act of Congress of June 21, 1860.

I.

The evidence proves conclusively that Antonio Baca was the son of Luis Maria Baca who died before his father, leaving a son whose descendants have conveyed to defendants Wise.

It was conclusively proved by the will of Baca, as hereinbefore stated, that in addition to the 18 children **who survived** him, as proven by plaintiffs, (Tr. 167),

he had another son who died before he did, and that this deceased son left a widow by the name of Francisca Garviso. Evidence was introduced by defendants Wise to prove that this son was Antonio Baca; the husband of said Francisca Garviso; under whose descendants Joseph E. Wise and Margaret W. Wise deraign their title to this 1-19 interest.

This evidence consists of (1) the testimony of the witness Marcos C. de Baca; (2) Corroboration of his testimony by evidence in possession and control of plaintiffs which they refused to produce upon the trial; (3) the deeds executed by the descendants of Antonio Baca.

In addition to this evidence there was other evidence which the court did not allow defendants Wise to introduce, for reasons hereinafter set forth, to wit, (a) certified copy of an ancient document signed in 1879 by Prudencio Baca, now deceased, a son of Luis Maria Baca, and filed in the District Court of the Territory of New Mexico, which contained a full family tree of all the descendants of Luis Maria Baca, including this son Antonio and his heirs. This document being an ancient writing, more than thirty years old, and Prudencio Baca being dead, was admissible as evidence of pedigree. (b) Certified copy of the judgment of the District Court of New Mexico, in the suit of Perea et al. v. Sulzbacher, et al., being a suit for partition of Baca Location No. 1, in which judgment that court decreed that Antonio Baca was a son of Luis Maria Baca, who dying left a son Juan

Manuel, who had two children, etc., as testified to by Marcos C. de Baca in this case.

We will first consider the evidence which the court permitted appellees Wise to introduce upon the trial.

The Evidence of the Witness Marcos C. de Baca.

Marcos C. de Baca, a witness for defendants Wise, testified: That he was fifty eight years old; was born and lived in New Mexico, and practised law since 1891, for three years had been a translator in the U. S. Land Office in New Mexico; that he is a son of Tomas C. de Baca, who, as attorney in fact for a great number of the heirs of Luis Maria Baca, executed the deeds of 1864 and 1871 to John S. Watts; that he is a grandson of Juan Antonio Baca, who was a son of Luis Maria Baca, and therefore that he is a great grandson of Luis Maria Baca. (Tr. p. 329-330); that for many years he has been gathering data in regard to the descendants of Luis Maria Baca, (Tr. p. 330).

The various deeds in evidence in this case show that there are probably a few hundred of these descendants at the present time. The descendants of a man dying in 1827, who had nineteen children, all of whom were married and had children, would necessarily be very numerous. Of all of these descendants, the witness, Marcos C. de Baca, was best qualified to testify to the pedigree and family tree of the descendants of Luis Maria Baca, for the reason that for years he has been making and keeping a genealogy of the family. (Tr. p. 330). This

witness had no interest whatsoever in this case. He testified that he first met Joseph E. Wise in 1913; that witness was asked by Wise and told him who the heirs of Luis Maria Cabeza de Baca were, and that later witness agreed to obtain for Mr. Wise the deeds from the heirs of Antonio Baca, which have been offered in evidence; that the witness was paid for his services; but that the purchase price was paid directly to the heirs by Mr. Wise, through him; that the witness had no interest in the matter at all. (Tr. pp. 371-372). The deeds obtained by the witness were made first to the witness as grantee, and he immediately transferred the titles to Joseph E. Wise and Jesse H. Wise, Defendants Wise Exhibits 9, 10, 11, 12 and 13, (Tr. pp. 258-261).

We are making these statements because they were duly considered by the court in determining the interest and credibility of the witness.

The witness further testified that in 1873, he was living in the town of Pena Blanca with his father, Tomas C. de Baca; that he was then sixteen years of age, and had recently returned from the college he was attending in Missouri; (Tr. p. 347-371); that in this year, 1873, Prudencio Baca, son of Luis Maria Baca, then an old man of seventy years of age, came to the little town of Pena Blanca, from Loma Parda in Moro County, in the northern part of the Territory. (Tr. p. 350).

This was the same Prudencio Baca whose name is affixed to the ancient document containing the family tree of Luis Maria Baca, on file in the case of Perea vs. Sulz-

bacher, in the District Court of the Territory of New Mexico, about which more will be said in this brief.

Prior to the year 1873, to wit, in 1864, this Prudencio Baca had signed the first deed to John S. Watts (Tr. p. 154). The second deed to John S. Watts of date 1871, was not signed by Prudencio Baca. It was signed for him by Tomas C. de Baca, his attorney in fact, (Tr. p. 197). In 1873, John S. Watts had left New Mexico and taken up his residence in Illinois, (Tr. p. 297).

The witness Marcos C. de Baca met Prudencio Baca in 1873 at Pena Blanca, and inquired of him whom the children of Luis Maria Cabeza de Baca were, (Tr. p. 350); Prudencio Baca told him that Antonio Baca was the eldest child of Luis Maria Baca; and he also told him that Juan Antonio Baca was another child, being the grandfather of the witness, and also gave the witness the names of the other heirs, (Tr. p. 355). The witness testified he had conversations with Prudencio at different times, in regard to who the sons of Luis Maria Baca were; many conversations prior to Prudencio's death; (Tr. p. 337); that Prudencio told him that Antonio Baca, the first son of Luis Maria Baca, was the husband of Francisca Garviso, who was mentioned as the widow of the deceased son in the will of Baca, hereinbefore referred to. (Tr. 388). He further testified, in regard to his conversation with Prudencio:

> "I was showing Prudencio a list of the names of the family, as I have got them and was inquiring or him whether it was correct or not. In all the lists

that I made I always had the name of Antonio Baca as the first son of Luis Maria Cabeza de Baca. * * * He said it was a correct list of Luis Maria Cabeza de Baca's family * * * I have a list with me made at that time, but it is a copy of the one I made at that time. I have got several lists on scraps of paper * * *" (Tr. p. 356) "This I say, is a copy of the list I then submitted to Prudencio Baca. It contains not only the names of the sons, but the descendants of the sons, their wives and their children and grandchildren;" Tr. p. 357.

He further testified that he had a conversation in 1875, prior to the bringing of the partition suit, hereinafter referred to, with Manuel Baca another son of Luis Maria Baca, now dead, on the subject of Antonio; he had conversations with him at different times also, at Pena Blanca, Tr. p. 358. And Manuel Baca told him that Antonio was the eldest child of Luis Maria Cabeza de Baca, and that his list was correct. (Tr. p. 359). In 1893 or 1894 the witness had conversation with Domingo Baca, another son of Luis Maria Baca, also at Pena Blanca, (Tr. p. 359) and he told him that Antonio Baca was a son of Luis Maria Baca.

"QUESTION by the Court: I should like to know how you were interested in making these inquries. What prompted you to make these inquiries on these various occasions?

A. I had a notion to make a book of the family record from Luis Maria de Baca to the present genera-

tion—I had that notion in 1873 when I left school —I take it today when I find any member of the family that I haven't got in the book. I inquire from him who his children are, and I put them down." (Tr. p. 360).

"Q. Then you are not interested in the matter at all, except— A. No, sir, except to keep the record of the family; that is all." Tr. p. 361.

He further testified:

"I have been informed by Prudencio Baca, and by my father, that Antonio Baca was dead in 1873. * * * Prudencio Baca stated to me the name of the son of Antonio Baca; his name was Juan Manuel Baca. I did not know Juan Manuel Baca in his lifetime. I was told by Prudencio Baca, and by my father, and by Manuel Baca, that Juan Manuel Baca was dead prior to 1873 * * * I was told that Juan Manuel Baca was married and his wife was living at that time (1873); Prudencio Baca told me that," Tr. p. 363. "Prudencio did state the name of the wife at that time. The name he gave me was Feliciana Padilla," Tr. p. 363. "I made inquiry in regard to her, as to where she is; she is dead * * * I think she died about 1882. Baca left two children surviving him; the names of the children that Juan Manuel Baca left are Jose Baca and Preciliana Baca. Jose was a son and Preciliana was a daughter. Preciliana afterwards married. She married Mares, and her name thereafter

was Preciliana Baca Mares. I did know Jose Baca in his life time; he is dead; I think he died in 1905; he did leave children. I know his children. The names of the children of Jose Baca are Preciliana Baca, Esteban Baca, Francisco Baca, Luciana Baca, Pilar Baca, and Epigmenia Baca * * * These various persons whose names I have mentioned as the children of Jose Baca are the same persons who signed the deed to me, Tr. p. 366. Preciliana Baca is dead; she was married in her lifetime to Antonio Mares. I knew him; she left children; I know all the children she left. Their names are," etc. Tr. p. 367.

The witness testified he was the same Marcos C. de Baca to whom all these children executed deeds in evidence in the case, and the same Marcos C. de Baca who executed his deed to Joseph E. Wise and Jesse H. Wise. The witness then made a list of the children and descendants of Antonio Baca, and the same was received in evidence as a matter of convenience, and is set forth on page 368 of the Transcript.

The so-called controversy as to pedigree:

The testimony of the witness as to what Prudencio and other members of the family, told him in regard to Antonio and his descendants, was objected to by plaintiffs on the ground that there was a controversy at the time in regard to this Antonio. We will show, in the first place, that there was no controversy; and in the next place, that if there was, the statements of Prudencio Manuel were made to Marcos before any controversy started.

In the first place, opposing counsel assert that a controversy as to the pedigree of Antonio Baca arose in the proceedings under the will of Luis Maria Baca. The papers, however, themselves show there was no controversy on that subject. The widow of Antonio claimed something from the estate, and the executor claimed that as Antonio was indebted to the estate, this indebtedness should be paid out of what was coming to him, (Tr. p. 448). This claim the Governor order to be presented to the Alcalde of Cochite, with the understanding that if something was given to the deceased husband in his lifetime it should be deducted from whatever he was entitled to under the will, (Tr. p. 452).

Marcos C. de Baca on this point testified:

> "I never heard of a controversy as to whether or not Antonio Baca was or was not a son of Luis Maria Baca. There was no controversy before the Governor of New Mexico of the Mexican Republic as to whom the children of Luis Maria Baca were, or the grandchildren of Luis Maria Baca. As I have been informed, the controversy was between the wife of Antonio Baca and the administrator of Luis Maria Baca." (Tr. p. 339) * * * "It was on account of some debts that Antonio Baca was owing at the time of his death to Luis Maria Cabeza de Baca." (Tr. p. 340).

There was no question of pedigree involved under the will of Luis Maria Baca; there was a question of how much, if anything, Antonio owed his father's estate; but

that there was such a son was unquestioned by the executor; and that Francisca Garviso was his widow, was beyond dispute.

This disposes of the assertion made by opposing counsel that statements of the sons of Baca in 1873 and thereafter, were inadmissible, by reason of a controversy as to the pedigree of Antonio Baca in 1827. There was no controversy on that question in 1827.

The second controversy which opposing counsel refer to was the partition suit brought by Perea, et al., for the partition of Baca Float No. 1, p. 349. The witness Marcos C. de Baca, testified he had heard of this suit that he thought it was brought in 1875, (p. 346). He further testified, as to this:

> "I heard of the Perea lawsuit of 1875. I don't know whether lists of the heirs were submitted at that time or not. I suppose that was a matter which involved the whole Baca family. I don't know whether it did or not. I have never seen the record in that case, even today." (p. 373).

The first conversation the witness had with Prudencio Baca was in 1873, two years before that suit was brought, (p. 346), and the conversation with Manuel Baca was before the suit was brought, (p. 358). So that the statements as to pedigree, made by these two sons to the witness were **anti litem motam.**

Again, he testified he had conversation with various descendants of Luis Maria Baca down to the present

time. It is fair to presume that the partition suit brought in 1875 had long since gone to judgment.

There is no evidence, however, in this case, that the partition suit of Perea involved a dispute as to whether or not Antonio was a son. The witness on this point testified:

> "WITNESS: I said that I thought it was in 1875 that a partition suit was brought for the partition of Baca Location No. 1 in New Mexico, and for the partition of the Ojo del Espiritu Land Grant at that time. * * *
>
> Q. Now in 1875 and in 1874 and in 1873 you remember discussions do you not in your family and among the other members of the Baca family that you met, as to how they were going to divide up this grant No. 1, or this Ojo del Espiritu? A. No, sir. Q. No discussion was taking place? A. No, sir * * *
>
> Q. There was a controversy existing sometime previous to the bringing of the lawsuit wasn't there; a discussion and contention? A. Not that I knew * * *
>
> Q. Well, now, some of these Bacas in this lawsuit which you refer to were claiming some rights as against somebody else, weren't they? A. No, sir, I think that those rights were claimed by Don Jose Perea, who claimed to have purchased the interest of those Bacas.

Q. You don't happen to know, because you were so young at that time, how long anterior to that there had been any quarrel or any discussion or any contention between the parties? A. I never heard any." Tr. pp. 349-353.

The only evidence in the record in the present case, in regard to the partition suit brought in 1875, by Jose L. Perea, for the partition of Baca Location 1, was the testimony of this witness, Marcos C. de Baca; and he testified simply that he knew of the fact of such suit being brought, but had never investigated the records thereof, and knew nothing further about it. The mere fact of a partition suit being brought would not raise any presumption that one of the controverted questions of fact in that case was whether or not Antonio Baca was a son of Luis Maria Baca, or that Prudencio Baca, or Domingo Baca, or any of the other sons, were in fact, sons of Baca. Therefore, we say there is no evidence in this case to show that a dispute arose in that case, in regard to Antonio Baca; and the witness testified that he never heard of any controversy as to whether or not Antonio was a son of Luis Maria Baca, (Tr. p. 339). He was asked:

"Q. Now at the time you had these conversations" (referring to the conversations with his uncle Prudencio and other uncles) "was there any controversy that you know of, as to whether or not Antonio Baca was or was not a son of Luis Maria Baca? A. I never knew any controversy between the family." Tr. p. 337.

The pleadings in the partition suit of Jose Perea are not in evidence in this case; nor is any part of the record of that case in evidence here; what the issues of controversy were, we do not know, except that it was a suit in partition brought by one Jose Perea, against the heirs of Luis Maria Baca. For ought we know, it was alleged and admitted by all the defendant heirs in that case, if they were defendants, and we do not know whether they were or not; that Antonio was a son of Luis Maria Baca; and the controverted questions in the case might have been as to other children or grandchildren; or as to the validity of deeds; or there might have been no controversy at all.

It was shown during the trial that counsel for plaintiffs had in their possession a certified copy of the affidavit of Prudencio Baca which was filed in that partition suit; they knew of the suit, and if there was any issue or controversy in that case as to whether Antonio was a son, counsel for plaintiffs would undoubtedly have produced certified copies of the record of the case to show that fact.

Therefore, we submit: That there was no controversy in the partition suit of Perea in regard to Antonio Baca or his descendants being heirs of Luis Maria Baca, so far as the record before this court shows; for the only evidence is the testimony of Marcos C. de Baca, who denies there was such a controversy. Secondly, whether there was such a controversy or not, is immaterial, because the statements of Prudencio Baca and Manuel Baca

to the witness, were made long before the partition suit was brought. They were **anti litem motam** statements, and were admissible in evidence. 9 Ency. of Ev. 739; 16 Cyc. 1230.

The partition suit of Jose Perea was brought forty years ago. The case must have gone to judgment twenty or thirty years ago; the controversy in court, if there were a controversy, having been ended by judgment, the reason for excluding declarations made by deceased members of the family, while the controversy existed, no longer existed after that judgment. And the witness Marcos C. de Baca testified that he has, up to the present day, been making and keeping a genealogical record of the descendants of Luis Maria Baca, and never heard it controverted or denied by any of the descendants that Antonio Baca was a son. The witness testified he knew personally the present descendants of Antonio Baca, being the persons who executed deeds under which Wise claims title; they are over twenty in number. In each of these deeds, these twenty descendants recite as a fact that they are the children either of Jose or Preciliana, who were children of Juan Manuel Baca, who was a son of Antonio Baca, who was a son of Luis Maria Baca. Defendants Wise Exhibits 9-12, Tr. 258-260; and the recitals in those deeds of these present descendants corroborate the testimony of Marcos C. de Baca.

Presumption arising from possession of evidence by plaintiffs at the trial, which they failed to introduce.

During the trial of this case the plaintiffs admitted

having in their possession, and subject to their control, a certified copy of a portion of the record in the partition suit of Jose Perea, hereinbefore referred to. Tr. 328-453 454. This certified copy was admitted to be a copy of an affidavit signed by Prudencio Baca in 1879, as to th heirs of Luis Maria Baca. Counsel for Wise requested plaintiffs to produce this copy, which they refused to do; and the court would not require them to produce it (Tr. p. 328). Counsel for Wise asked for time within which he could obtain a certified copy of the statement of Prudencio Baca; as he understood that counsel had the original; this application was denied. (Tr. pp. 333-335). The statement or affidavit, being signed by Prudencio, the son, more than thirty years ago, and he being now dead, was competent evidence as to pedigree.

> "Statements in writing relating to pedigree made or recognized by members of a family, who are dead, are admissible in evidence * * * so also are entries in family Bibles, or other family records * * * old pedigrees and genealogical tables."
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> 9 Ency. of Ev. 745.
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> "An ancient document is admissible in evidence without direct proof of its execution, if it appears to be of the age of at least thirty years, is found in the proper custody, and is unblemished by alterations or otherwise free from suspicion; the instrument being said in such a case to prove itself."
> 17 Cyc. 443.

"Ancient documents have been admitted, not only as muniments of title, or as instruments under which the parties to the action in which they are sought to be introduced assert a claim, but also to show other facts which they recite even in actions between strangers to the instrument."

17 Cyc. 444.

After the submission of this case, but before the court had decided the same, counsel for Wise obtained a duly authenticated copy of the affidavit of Prudencio Baca filed in the District Court of New Mexico, in the partition suit before mentioned, and made written motion for leave to file the same, as evidence in this case; in which it was stated: "Said affidavit sets forth the names of all the children and descendants of Luis Maria Baca, and shows that Antonio Baca, also called Jose Antonio Baca, was a son of Luis Maria Baca; that said Antonio died leaving one legitimate child, to wit, Juan Manuel; that he died leaving two children, Jose Baca and Perciliana, who married Antonio Mares, (Tr. p. 434-435). The authenticated copy of the affidavit was deposited with the clerk, for the inspection of the court and counsel. (Tr. 435). The motion was thereafter denied by the court; exception taken, and this ruling of the court is assigned as error. Assignment of Error XIV, Tr. p. 565.

The fact, however, is shown conclusively by the record, that counsel for plaintiff did have in their possession during the trial, the certified copy of an ancient instrument which was signed by Prudencio Baca, and

which document was an affadavit in which Prudencio set forth the names of the sons and daughters of Luis Maria Baca, and their descendants, up to the date it was made, to wit, 1879. If the testimony of the witness, Marcos C. de Baca, to the effect that Prudencio had told him in 1873 that Antonio Baca was the son of Luis Maria Baca, was false, this affidavit of Prudencio was the strongest existing evidence to contradict him. On the other hand, if the testimony of Marcos was true, then this affidavit of Prudencio would have corroborated him.

Plaintiffs, having this evidence in their possession and control, at the trial, and having refused to introduce the same, the presumption of law is that it did corroborate the testimony of Marcos.

> "The failure to produce evidence within a party's control raises the presumption, that, if produced, it would operate against him; and every intendment will be in favor of the opposite party."
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> Kirby v. Tallmadge, 160 U. S., 379, 40 L. ed. 463;
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> Clifton v. U. S., 4 Howard, 24; 11 L. ed. 957;
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> Bartlett v. Kane, Fed. Cases, No. 1077;
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> The Busy, Fed. Cases No. 2332.
>
> Quantity of Distilled Spirits, Fed. Cas. 11494.
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> "Where it was within the power of a party to produce evidence on controverted issues the failure to

produce it warrants a presumption against such party on those issues."

The M. E. Luckenbach, 174 Fed. 265; affirmed 178 Fed. 1004 C. C. A.

"Where a party has the means of producing testimony within his knowledge and keeping upon a material question involved in a case, and fails to do so, the presumption arises that the fact is against him."

Choctaw M. R. Co. v. Newton, 140 Fed. (C. C. A. 8th C. p. 226.) Quotation from page 238.

"Where a party suppresses evidence in his control, the presumption arises that its production would be against his interest."

Westervelt v. Nat. Mfg. Co., 69 N. E. 169, 33 Ind. App. 18.

"The suppression of important evidence is always a fact to be weighed against the party suppressing it."

Sunes v. Rockwell, 156 Mass. 372, 31 N. E. 484.

As the testimony of Marcos C. de Baca, in regard to the statements made by Prudencio in 1873, and by Manuel in 1875, were, to say the least, **prima facie** proof that Antonio Baca was the son of Luis Maria Baca; that he left a son, Juan Manuel, who dying left two children; it was the duty of plaintiffs to have refuted this evidence

by the highest and best evidence in their possession and control, to-wit: The certified copy of the ancient document made by Prudencio Baca in 1879. They had this evidence with them in court; they had it with them throughout the entire trial of the case. They refused to introduce it. The presumption of law is, therefore, that if produced, it would have corroborated the testimony of the witness, Marcos C. de Baca.

Therefore, we say, the testimony of Marcos is corroborated by the ancient document, signed and sworn to by Prudencio Baca in 1879, more than thirty years ago, which plaintiffs had in their possession at the trial, and failed and refused to introduce in evidence. Such is the presumption of law from the acts of plaintiffs themselves.

Having this paper in their possession; knowing as plaintiffs did know, that it corrroborates the testimony of Marcos, as to what Prudencio, and the other sons of Baca, told him in regard to Antonio and his descendants; we do not think it lies with counsel to cast aspersions, and doubts, and insinuendos at the testimony of Marcos C. de Baca, as they have done in their brief in this case.

Prior to the decree herein rendered, the lower court reopened the case for the purpose of permitting Joseph E. Wise to file a certified copy of the will of Luis Maria Baca, as the copy introduced at the trial, although sworn to by the witness Marcos C. de Baca, as being a true copy, was not a certified copy; and the court also opened the case to give plaintiffs, defendants Bouldin and Santa

Cruz Development Company, an opportunity to introduce any testimony on that subject—and the legitimacy of the son Antonio, (Tr. 439-440). Thereafter, and before the rendition of the decree, defendant Joseph E. Wise produced, offered in evidence and filed a certified copy of the will; counsel for all parties being present in court, objected thereto. (Tr. 441-442). At the same time, counsel for Joseph E. Wise offered in evidence a duly authenticated copy of said affidavit of Prudencio Baca, and a duly authenticated copy of the judgment rendered by the District Court of the Territory of New Mexico, in the case of Perea vs. Sulzbacher, the case referred to during the trial as the partition suit brought in 1875; in which judgment that court found and decreed that Antonio Baca, or Jose Antonio Baca, as he somtimes is called, **was a son of Luis Maria Baca.** Objection was made to the filing thereof on the ground that the court had opened the case only for the purpose of permitting Wise to file a certified copy of one paper, and no other purpose. The objection was sustained and Wise excepted. This ruling of the court is assigned as error. Defendants Wise Assignment of Error XVII, Tr. 568.

We call attention at this place to these rulings, because, if, for any reason, this Honorable court is not satisfied with the evidence introduced to prove that Antonio Baca was a son of Luis Maria Baca, it is manifest that there is other evidence of most positive and conclusive character, which can be introduced should the case be remanded for another trial, the introduction of

which evidence, we think, should have been permitted by the lower court, under the circumstances of this case.

The lower court, however, was satisfied, from the evidence that was introduced, that Antonio Baca was a son, who left descendants, as before set forth; and being so satisfied, found in favor of defendants Wise, as to the 1-19 interest inherited by the heirs of Antonio. And this portion of the decree, we submit, should be affirmed.

The evidence of Marcos C. de Baca was admissible.

Opposing counsel urge in their briefs that the testimony of Marcos C. de Baca was inadmissible for the reason that Wise claims some title under the deeds which the heirs of Baca executed to John S. Watts, and for that reason is estopped from claiming a title from a different source.

They admit that this contention does not apply to Margaret W. Wise, who claims nothing from any heir of Baca except Antonio.

In support of their contention they cite authorities to the effect that where two persons claim under a common grantor, **and no other source,** neither can attack the title of that common grantor, or deny that he has a valid title at the time of the conveyance. But Joseph E. Wise does claim title from another source; he claims under the heirs of Antonio, under whom none of the opposing parties claim any title. In the next place, Joseph E. Wise does not attack the title of any heir of Luis Maria Baca. He admits that they all had title under the will

of Luis Maria Baca. He is only endeavoring to prove who the heirs of Luis Maria Baca are; and this proof does not in any way affect the title of any heir.

Again, the deed from the heirs of Baca to Watts of 1864, Plaintiffs' Exhibit C, only purports to convey the right, title and interest which each of the grantors has, whatever that may be. The words of conveyance in the deed are: "do bargain, sell and convey to said John S. Watts * * * **all our right,** title and interest and demand in the following lands, located upon by us as heirs of Luis Maria Baca," etc. (Tr. p. 157). We admit, and in no way attempt to deny, that each maker of that deed did convey whatever interest he then had in the lands in question, as stated in the deed; but upon what theory that deed precludes Watts, or anyone holding under Watts, from obtaining additional title from other heirs, we cannot conceive.

There are five covenants in this deed, in none of which is it recited that the signers are the only heirs, or are all the heirs of Baca, or anything to that effect.

Again, we have shown in our other brief that this deed is not executed by four of the heirs or grantees of heirs, of Baca; and we do not know of any principal of law which would prevent either Watts or a grantee of Watts, from obtaining any of the interest of any of these other heirs. In the case of Elder v. McClaskey, 70 Fed. 529-561, 17 C. C. A. 251, on p. 547 of the decision in the Fed. Rep, says:

"It is well settled that a vendee is not estopped to deny the title of his vendor."

Citing Robertson v. Pickrell, 109 U. S. 608;

Watkins v. Holman, 16 Pet. 25;

Willison v. Watkins, 3 Pet. 43;

Blight's Lessee v. Rochester, 7 Wheat, 535.

In the case of Bybee, v. Oregon & Cal. R. Co., 139 U. S., 663-684; 35 L. ed. 305, the court said:

"It is conceded that, as a general principle, the grantee in a deed of conveyance is not estopped to deny the title of his grantor, and, unless this case be an exception to this rule, it will necessitate an affirmance of this judgment * * * In Merryman v. Bourne, 76 U. S. 9 Wall 592, (19: 683), it was stated that the vendee 'holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party;' and in Robertson v. Pickrell, 109 U. S. 608, (27: 1049) it was held, in an elaborate opinion by Mr. Justice Field, that defendants, who held under a deed of a life estate, were not estopped from setting up a superior title. Cases in the state courts to the same effect are Comstock v. Smith, 13 Pick. 116; Osterhout v. Shoemaker, 3 Hill, 518; Clee v. Seaman, 21 Mich. 287, and Sparrow v. Kingman, 1 N. Y. 242."

In the case of Robinson v. Thornton, 102 Cal. 675;

34 Pac. 120, this question is elaborately considered, and the court holds that a grantee does not assume any obligation towards his grantor, and that he is not estopped from showing in any controversy, another and independent title in himself. The court said:

> "There is no estoppel when the occupant is under no obligation, express or implied, that he will at some time or in some event, surrender the possession. The grantee in fee is under no such obligation * * * he owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title.

Opposing counsel further claim that Marcos C. de Baca was estopped by covenants in the deeds of 1864 and 1871, made by his ancestors, from acquiring the title from the heirs of Antonio Baca. We have considered the deed of 1864. The deed of 1871 (Plaintiffs' Exhibit O, Tr. p. 197,) so far as it is a conveyance of Baca Location No. 3, or of any other lands mentioned in the deed of 1864, is nothing but mere quitclaim. In that deed the grantors first grant and convey the location known as number 5, a tract of land in the northern part of Arizona, more than two hundred miles distant from the tract in dispute in this action. The makers of that deed do make most binding covenants as to their ownership and title to that location number 5; and then they say that they relinquish and quitclaim to Watts all their right, title and interest

in all the lands in the deed of May 1, 1864, mentioned and described. (Tr. p. 202).

Opposing counsel assert in their brief, that the covenants of the ancestor of Marcos C. de Baca, in a deed conveying to John S. Watts location No. 5 estop said Marcos C. de Baca from acquiring title to location 3. They cite no authority for such a doctrine; and of course none can be found.

Declarations of a grantor made after his grant in disparagement of his title, are not admissible against his grantee or other persons claiming through or under him to impeach the deed.

The soundness of the foregoing statement, as an abstract principle of law, is not disputed; but it has no application whatsoever to this case.

Admissions against interest are always admissible as against the one who makes them. Admissions against interest, made by a grantor, while holding the title, are not only admissible against him, but also against his grantee. 1 Ency. of Ev. 510.

But if the grantor made the admission in derogation of his title, **after** he parted with his interest, such declarations are not admissible against his grantee. Nor are they admissible against his grantee if made **before** the grantor himself acquired title.

> "Declarations by a former owner of property, made **before** he acquired it, or **after** he parted with

it, do not bind his successor in interest.

Hutchins v. Hutchins, 98 N. Y. 56.

Such being the law, opposing counsel argue that the statements made by Prudencio Baca, Manuel Baca and other sons of Luis Maria Baca, as to Antonio Baca being a son of Luis Maria Baca, and their brother, are inadmissible in evidence, because such evidence is an admission against interest made by a grantor after he parted with his title, and tends to disparage the title he conveyed.

But statements or declarations as to pedigree cannot be classed as admissions. Such statements are not admissible as admissions against interest, but on an entirely different ground and for an entirely different reason.

It is the general rule that all hearsay evidence is inadmissible. To this rule are many exceptions: (1) Dying declarations, (2) Declarations in the nature of **res gestae;** (3) Declarations against interest, (4) Declarations concerning matters of pedigree; and so on. 6 Ency. of Ev. 447.

The learned counsel admits such declarations were admissible as hearsay evidence of pedigree; but they argue, that as the declarations were not admissible as declarations against interest, binding on a grantee, they were not admissible at all.

They might as well say that as the declarations were not admissible as dying declarations, they were not admissible at all.

We did not offer the evidence as a dying declaration nor as a declaration against interest binding on anybody, but as a declaration in a matter of pedigree. If admissible for that purpose, it was the duty of the court to admit it. It is absurd for counsel to argue that evidence offered for one purpose for which it is admissible, must be excluded by the court because it is not admissible for any other purpose. And that is their argument.

Again, the testimony did not in any way disparage the title which Prudencio and the others conveyed to Watts by the deed of 1864. We have shown that in that deed, and the deed so recites, they only grant and convey "all their right, title and interest." Tr. p. 157. An inquiry as to the quantity of interest each heir had, when he so conveyed, is no disparagement of the title; for each only purported, in that deed, to convey whatever interest he had. Evidence as to who the heirs were does not disparage the title in the least.

The deed of 1871, as we have shown, was only a quitclaim as to Location No. 3, and therefore only purported to convey whatever interest each had, if he had any. Evidence as to who the heirs of Baca were was no disparagement of that title.

We submit there is no merit whatsoever in this contention of counsel.

The question is one of heirship rather than pedigree.

The executor of the will of Baca, in his petition to

the governor in 1827, stated that he had rejected the claim of Francisca Garviso, widow of the deceased son, to participate in the estate, for the reason that charges against his son wiped out his patrimony; and he asked the governor to make a decree in the matter. Tr. p. 448-449.

The governor did then order the Alcalde of Cochite to hear both parties "with regard to the claim of Francisca Garviso and pass judgment adjusted to justice, with the understanding that if something was given in life to her deceased husband it will be deducted of that which at last and by the death of his father he should be entitled to." Tr. 452.

The record in this case does not show that the matter was ever presented to the Alcalde; or that any decision of the controversy was ever made.

Opposing counsel argue that the petition of the executor, should be given the same force and effect, as a judgment. That we must assume and presume, that the Alcalde **did** hear the matter, and that the Alcalde did decide that Antonio's debts to the estate exceeded his distributive part of his father's estate.

But there is no presumption, because a claim is made, that it is just. There is no presumption, because a complaint is filed in a case, that a judgment was rendered thereon; or that a judgment was rendered in favor of the claimant.

The order of the governor was that the Alcade should

hear the matter; that whatever was given to Antonio in his life time should be deducted from his part of the inheritance. Giving this order of the government the force of a judgment, it decides nothing except that the matter should be heard by a certain Alcalde. And the matter was never heard, so far as the record here shows.

The will of Luis Maria Baca directed that "the balance of lands known as mine be divided between all my heirs in equal parts." This will the governor approved. Under this will the heirs of Antonio inherited the share of the lands coming to their father.

No judgment or order of any court or officer, or tribunal, has annulled this provision of the will; or decided that the debts due the estate by Antonio were equal to or greater than his patrimony. This will is conclusive that Antonio, or his heirs, he being dead, were heirs of Luis Maria Baca.

Thirty three years after the executor filed his petition, and the governor ordered the matter to be heard, Congress passed the Act of 1860, granting to the heirs of Luis Maria Baca, the right to select some 500,000 acres of land. The heirs of Baca did, in 1863, select, as part of that land, Location No. 3, the tract of land described in the decree in this case.

If Antonio Baca, or his descendants, were heirs of Luis Maria Baca, this grant by Congress was made to them, as well as to all the other heirs.

The fact that Antonio was indebted to his father, or

his father's estate, in 1827, is utterly immaterial, for Congress did not make the grant to those heirs only who were not indebted to the estate. The grant is to all the heirs of Baca; and if Antonio, or his children, are heirs of Baca, they are included in the designation of those to whom the grant was made. The will of Luis Maria Baca makes all his children his heirs. The will itself decides the question.

We therefore submit that the lower court properly found from the evidence in this case that Antonio Baca was a son of Luis Maria Baca, to whom, with the other were heirs of Luis Maria Baca, to whom, with the other heirs of Baca, Congress made the grant by the Act of 1860. That the defendants Joseph E. Wise and Margaret W. Wise, as the grantees of these heirs of Antonio Baca, are the owners of the 1-19 interest now in controversy; and the decree of the lower court adjudging that interest to them, should be affirmed.

II.

The grant by Congress in the Act of June 21, 1860, is to all the heirs of Luis Maria Baca.

The Act of June 21, 1860, is as follows:

> "Sec. 6. And be it further enacted that it shall be lawful **for the heirs of Luis Marie Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to claim instead of the land claimed by them, an equal quantity of vacant land.** * * *"

17 Stat. at L. 71.

Opposing counsel assert that the words in the foregoing Act, to wit: "the heirs of Luis Maria Baca who make claim to the said tract of land," should be construed to mean: **those** heirs of Luis Maria Baca who made a claim to said tract of land before the Surveyor General of New Mexico, in a petition filed in 1857; and that any heir of Baca who did not join in that petition never made a claim and for that reason is excluded from his or her inheritance.

The petition filed with the Surveyor General in 1857, which counsel assert determined what particular heirs of Baca made claim to the Las Vegas grant, requires inspection to ascertain who made it, and what it says. It is set forth in the Transcript as "Santa Cruz Development Company's Exhibit 4, Tr. p. 403."

This petition is signed "Jno. S. Watts, Atty. for petitioners." It is not signed by any of the heirs themselves. It recites that in 1821, the State of Durango granted the lands to Luis Maria Cabeza de Baca, and **his male children;** that Baca long since died, and the only male children now living are, Luis, Prudencio, Jesus 1st, Jesus 2nd, Domingo and Manuel Baca; that the following sons are dead, to wit: Juan Antonio, Jose, Jose Miguel, Ramon and Mateo, and at the time of their death they left the following children and heirs—here follow the names.

Then comes the following very important statement: "Your petitioners further state that the foregoing con-

"tains all the surviving heirs of the said Luis Cabeza de "Baca, deceased, **known to your petitioners."** Tr. p. 405. That is all of the petition in this record.

According to the petition, the grant was not made to Luis Maria Baca alone, but jointly to him and his male children. As he has thirteen sons, including the son Antonio, the grant was made jointly to fourteen grantees, to wit: Luis Maria Baca and his thirteen sons. Each had an undivided 1-14 interest, as an original grantee, under the grant from the State of Durango, according to this petition.

The petition further states that Luis Maria Baca long since died. Such being a fact, and as the petition does not state he disinherited any of his children, all his children, both male and female, inherited, share and share alike, his 1-14 interest. Each son, however, in addition to his share of the father's estate, was entitled to an 1-14 interest in the whole grant, as an original grantee.

It is conceded, and the evidence shows, that Baca had six daughters, in addition to his thirteen sons. These daughters, if the petition aforesaid determines the question of ownership or claim, would only be entitled to an undivided 1-19 of the 1-14 interest that Luis Maria Baca himself had in the grant.

Each son would be entitled to an undivided 1-19 of the 1-14 interest as an heir, and 1-14 as an original grantee.

So that, if the petition to the Surveyor-General, and

not the Act of Congress, is to determine the amount of interest claimed by each heir of Baca, then Antonio Baca and his heirs would be entitled to 1-14 interest plus 1-19 of 1-14 interest; being a larger proportion than found by the lower court.

This is the result, if the contention of opposing counsel is correct, that the petition filed with the Surveyor-General in 1857, and not the Act of Congress, determines what particular heirs of Baca made claim to the Las Vegas Grant, and the amount of interest each is entitled to.

If opposing counsel are correct, then the lower court erred in decreeing Joseph E. Wise and Margaret W. Wise, as owners of the interest of the heirs of Antonio Baca, to be entitled to only an 1-19 interest, for the amount of Antonio's interest, as a grantee from the Mexican government, was 1-14 interest, and to this must be added the interest his heirs inherited from his father's estate. So if counsel was correct, they have no reason to complain of the decree which adjudges to the Wises only 1-19 interest; when according to their own showing and argument the Wises were the owners of more than 1-14 interest. The error, if any, is to their benefit.

However, as the Act of Congress did not limit the right to select lieu lands, to the male heirs of Baca; or the particular male heirs who are named in the said petition; but did grant the right to all the heirs; this petition is utterly immaterial.

There is no evidence in this case that the Surveyor-General made any report to Congress upon this claim or petition; or that he found or decided who the heirs of Baca were; or whether or not the Las Vegas grant was made directly to the sons, as well as the father. The report of the Surveyor-General is not in evidence. As the report, whatever it said or recommended, was not confirmed by Congress, it was utterly immaterial in this case. But even if it were material, it is not in evidence; it never was offered in evidence by anyone on the trial, and cannot be found in the record.

And opposing counsel are asking this court to decide that this report determines what heirs of Baca were owners of the Las Vegas grant, when the report is not in evidence in the case. Opposing counsel, in their brief, have seen fit to refer to this report as being filed with Congress, although there is no evidence in the record to that effect. But we also note they have taken great care not to state what the report was, or whether or not the Surveyor General made any recommendaion therein; or whether he found or determined who the heirs of Baca were.

The report of the Surveyor General is, however, contained in the decision of the Supreme Court of the United States, in Maese v. Herman, 183 U. S. 572-582; 46 L. ed. 335, in which case the said Act of 1860 is considered.

In this decision, as set forth on p. 578 thereof, the Surveyor General is quoted as saying therein:

"Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant and that they went upon the land knowing the exisence of a prior grant * * It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain * * * and that, in the absence of the one, the other would be a good and valid grant; but as this office has no power to decide between the conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress, through the proper channel for its action in the premises."

183 U. S. 578.

There is nothing in this report showing that the Surveyor General passed upon, or determined, or reported upon, what particular heirs of Baca made claim or were entitled to the Las Vegas grant; or that any of them had a valid claim, as against the claim of the inhabitants of the town of Las Vegas.

Upon the report, quoted in the above decision, the claim of Maese and others representing the town of Las Vegas, was confirmed by the Act of June 21, 1860; and by the same Act, being Section 6 thereof, heretofore quoted, Congress gave "to the heirs of Baca who make claim to the said tract of land as is claimed by the town of Las Vegas, the right to select other lands in lieu thereof.

"The heirs of Baca who make claim," etc., in the Act of 1860, read in view of the report of the Surveyor General, aforesaid, shows that it was the intention of Congress to grant to all the heirs of Baca, whoever they might be, the right to select other lands in lieu of the lands confirmed to the town of Las Vegas; and that Congress could not have had in mind any particular heirs of Baca, for the reason, that the report of the Surveyor General made no mention of any particular heirs, and made no finding upon that subject.

It is also clear, that if Congress intended that the grant should only be to those male heirs of Baca who, by John S. Watts, their attorney, filed the petition with the Surveyor General in 1857, namely, the surviving sons of Luis Maria Baca, it undoubtedly would have made the grant to the surviving sons of Luis Maria Baca, and not to the heirs of Luis Maria Baca generally.

The report of the Senate Committee on Private Land Claims, on May 19, 1860, refered to in the brief of opposing counsel, states (we quote from counsel's brief, as this report is not before us, and is not in evidence in the case), "that the heirs of Baca had expressed a willingness to waive their older title in favor of the settlers, under the grant to the town of Las Vegas," etc.

If only the surviving sons of Baca were willing to make this waiver, the Senate Committee undoubtedly would have said so; but they say that **all** the heirs of Baca are willing to make the waiver in favor of the town of Las Vegas; and it is because **all** of the heirs were will-

ing to waive their claims, that the Committee recommend the passage of the Act which gave to **all** the heirs of Baca, the right to make selection of other lands.

Again, in the decision of the U. S. Supreme Court, Maese v. Herman, supra, on page 579, the court goes on to say that after the approval of the Act of June 21, 1860, notice of the confirmation was sent by the Land Office to the Surveyor General of New Mexico, advising him that, "This law gives the land to the Vegas town claim, **and allows the Baca heirs** to take an equal quantity of vacant land, not mineral, in New Mexico," etc. Id. p. 579.

It was the duty of the Surveyor General to pass upon the selection made by the Baca heirs. He was instructed by the Land Office that the Act gave the right to make this selection, not merely to those of the heirs who filed the petition, but to **all** the heirs of Baca. If only the surviving sons of Baca were the ones to whom Congress made the grant, then they were the ones who could make the selection. But the Land Office took no such view of the Act of 1860. The Surveyor General is specifically instructed that this Act of 1860, "allows the heirs of Baca to take an equal quantity of vacant land," etc. This means, all the heirs of Baca, and no specific ones of them. And this construction of the Act of Congress made at the time, by the General Land Office, to whom the Surveyor General made his report, is, we think, conclusive to show that the grant was made to all the heirs of Baca, whomsoever those heirs may be.

Again, the U. S. Supreme Court itself, in the case of Maese v. Herman, after giving full consideration to the report of the Surveyor-General and the Act of Congress, says, in regard to this report on page 581 of the decision:

> "The surveyor general, however, did not assume to decide the dispute between the parties, but referred it to 'the proper tribunals of the country' and to Congress. Congress accommodated the dispute by a magnificent donation of lands **to the heirs of Baca,** and confirmed the original land to the town."

The Supreme Court of the United States itself construes the Act as being a donation to the heirs of Baca, and **not** to those particular heirs of Baca, to wit, his surviving sons, who by John S. Watts as their attorney, filed the petition with the Surveyor General of New Mexico in 1857.

Prior to that decision, the Supreme Court of the United States was called upon to pass upon certain questions involving Location No. 4 made under this Act of 1860. We refer to Shaw v. Kellogg, 170 U. S. 312-343; 42 L. ed. 1050. Mr. Justice Brewer, for the court, reviewed the Act of June 21, 1860, and the records of the Land Office, and amongst other things, says: (P. 315 of decision).

> "The survey made of the grant to the town of Las Vegas showed an acreage of 496,446.96 acres; a certificate of which fact was given **to the heirs of said Baca."**

The statement of facts in that decision further shows that on December 12, 1862, John S. Watts, attorney for the heirs of Luis Maria Baca, made a selection for Location 4. He signed his name "John S. Watts, attorney for the heirs of Luis Maria Baca," (p. 315 of decision).

That on December 5, 1863, John Pierce, Surveyor General of New Mexico, approved the selection as follows:

> "This is to certify that from good and satisfactory evidence, I am perfectly satisfied that the land on **which the heirs of Luis Maria Baca** have located their grant No. 4 * * * is non-mineral and is vacant."

And the Register and Receiver of the Land Office made similar certificate, saying that "we are perfectly satisfied that the land on which **the heirs of Luis Maria Baca** have located their grant No. 4 * * * is not mineral and is vacant." (p. 319 of decision). And so all the way through the location, the survey thereof, the approval, all refer to the lands selected by the "heirs of Luis Maria Baca."

In rendering the decision in that case, Mr. Justice Brewer, amongst other things, said:

> "The grant was made in lieu of certain specific lands **claimed by the Baca heirs,** in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the

limits of New Mexico. **The grantees, the Baca heirs, were authorized to select this body of land.**

Quoting p. 332 of decision.

We call attention to the last line of the foregoing quotation, which we have underscored. Here is the expression of the United States Supreme Court, that the grantees under the Act of Congress of 1860 were the Baca heirs; that **they** were authorized to make the selection of the lands. There is no intimation that only those heirs of Baca who were his surviving sons, and had joined in the petition filed with the Surveyor General, in 1857, were the grantees to make the selection, as claimed by opposing counsel.

Not only did the Land Department, the Surveyor General and the U. S. Supreme Court, construe the Act of 1860 as being a grant to all the heirs of Baca, and not to any particular ones of them; but Congress itself, by a later enactment, so construed this Act of 1860. We refer to an act entitled "An Act to Confirm Certain Private Land Claims in the Territory of New Mexico," approved June 11, 1864. 13 Stat. at L. 125 being an Act to amend the Act of June 21, 1860. It is as follows:

> "Be it enacted, &c., that the 6th section of the Act entitled "An Act to confirm cerain Privae Land Claims in the Territory of New Mexico," approved June 21, 1860, be and the same is hereby so amended as **to enable the heirs of Luis Maria Baca** to raise and withdraw the selection and location of

one of the square bodies of land confirmed to them by said Act, heretofore located by said heirs, on the Pecos river * * * and upon such selection and relocation, the title to said square body of land, the same being the one-fifth part of the private claim confirmed to said heirs, as aforesaid, so selected and relocated, shall be and is hereby confirmed to **the said heirs of the said Luis Maria Baca** * * *."

This amendment does not affect Location No. 3; but it does affect one of the other locations, and it shows that Congress, by the Act of 1860, granted the right to all the heirs of Luis Maria Baca to make the selection of land as therein set forth; and that this right was not confined to any particular ones of those heirs.

Not only did Congress so construe the Act; but John S. Watts, the attorney for the heirs of Baca; and the heirs of Baca themselves, also construed it as giving the right to all the heirs of Baca, and not merely to the surviving sons whose names appear in the petition filed with the Surveyor General. Thus, in the selection made of Location 3, on June 17, 1863, by John S. Watts, he says: "I, John S. Watts, the attorney of the heirs of Don Luis Cabeza de Baca, have this day selected as one of the five locations **confirmed to said heirs** under the sixth section of the Act of Congress approved June 21, 1860, the following tract * * *," and he signs himself, "John S. Watts, attorney for the heirs of Luis Maria Cabeza de Baca. Plaintiffs Exhibit K-1, Tr. p. 174.

This selection is made by the attorney of all the heirs of Baca, and he says that he makes it **for all of said heirs.** He does not pretend to act only for the surviving sons, whose names are mentioned in the petition which he himself had filed with the Surveyor General in 1857, as contended by counsel.

Again, in the application of John S. Watts of April 30, 1866, to amend the description of the location so made by him in 1863, he says: "You will find by reference to the papers on file in your office, that on the 17th of June, 1863, I filed with the Surveyor General of New Mexico, an application for the location of one of the five locations confirmed **to the heirs of Luis Maria Cabeza de Baca,** under the 6th section of the Act of Congress approved June 21, 1860 * * *" Plaintiffs' Exhibit K-7, Tr. p. 176. And he signs this also, "attorney for heirs of Luis Maria Cabeza de Baca."

Now, prior to Watts' making this application a number of the heirs of Baca had executed to him a deed, conveying to him all their right, title and interest in Location No. 3 of the Baca series, being the deed dated May 1, 1864, Plaintiff's Exhibit C, Tr. p. 154. Watts himself was the owner of a very large interest in Location No. 3, when he made the application to amend in 1866; and as such owner, he declares that the Act of Congress of 1860 confirmed to the heirs of Baca the right to make the location. He does not pretend that the right was only given to those male heirs who survived their father.

And the deed to Watts of May 1, 1864, supra, recites,

amongst the other heirs of Baca, the six daughters whose names we have heretofore mentioned; further showing that he considered that the grant by the Act of Congress was to all the heirs of Baca, both female children, as well as male.

For fifty years, the courts, the Land Office, Congress, the heirs of Baca, and John S. Watts himself, have construed and conceded, that the grant by Congress was to all the heirs of Luis Maria Baca; and now, in this case, and for the first time, the contention is made, that the grant was only to those surviving male heirs who made claim to the Las Vegas grant in the petition which, in 1857, was filed with the Surveyor General.

We submit that the construction given to the Act of 1860, by the Supreme Court, by Congress itself, by the Land Department, by the heirs of Baca, and by John S. Watts, is conclusive that the words in that Act, to wit: "It shall be lawful for the heirs of Luis Maria Baca who make claim to the said tract of land as is claimed by the town of Las Vegas," meant all the lawful heirs of Luis Maria Baca; and did not mean those heirs who, although they might make such a claim, nevertheless, were excluded, unless they were those particular heirs, who as, the surviving sons, asserted a claim in the petition filed with the Surveyor General in 1857, as contended by opposing counsel.

The argument of opposing counsel is based upon the decision of Connoyer v. Schaeffer, 22 Wall, 254-263. In that case the court did not construe the Act of June

21, 1860, but the Act of Congress of July 4, 1836. The question in that case arose in regard to a grant within the limits of the Louisana purchase, which had been passed upon by a board of commissioners, created by Acts of Congress of 1805 and 1807. The power and duties of the board of commissioners created by those Acts, were different from the powers and duties of the Surveyor General of New Mexico under the Act of 1854; and a reading of that decision throws no light upon the present controversy. We will quote the syllabus of the case, for it crystallizes the points decided:

> "1. A Spanish claim to land, if confirmed by the commissioners, has the effect of a confirmation to the legal representative of the person to whom the original concession was made, where the commissioners passed upon nothing but the merits of the original concession.
>
> 2. But where the claimant presented before the Board, besides the original title, evidence of a derivative title, **and the commissioners decided upon both,** the confirmation operates as a grant to the claimant, although his name was omitted in the form of confirmation."
>
> Connoyer v. Schaeffer, 22 Wall. 254-263.

In that case, and in many other cases, it has been held, that where the report of the Commissioner, or, as in other cases, of the Surveyor General, contains a specific recommendation, that a certain Mexican or Spanish

grant be confirmed to a certain individual, the Act of Congress confirming such report vests the individual with title. Of course this is so. For the action of Congress in such a case, is the same as though it had named the individual in the Act itself. And we admit, if Congress, in the Act of 1860, had limited the right to make selection of lands to those sons of Baca for whom Watts had filed the petition in 1857, then those sons undoubtedly would have been the grantees under the Act of Congress. But Congress did not so express itself; it made the grant to the heirs of Luis Maria Baca, and left it to the courts to determine who those heirs were.

Opposing counsel, in their brief, have referred to a number of reports of the Surveyor General of New Mexico, on other claims to Mexican grants, which were reported to Congress and confirmed by the Act of 1860. None of these reports are in evidence in this case, and none of them are material. We have some doubt, however, as to the propriety of counsel referring to reports of the Surveyor General not in evidence, and not in the record. But if such is the proper practice, then it does seem to us, that the great industry of counsel would have enabled them to have discovered the specific report of the Surveyor General upon the rival claims made by the town of Las Vegas and the heirs of Baca, to the Las Vegas grant, which **is** material in this case. It would appear, that the only report of the Surveyor General of any importance, in the present case, was the particular report which the industry and assiduity of counsel permitted them **not** to find.

Opposing counsel say, that under the Act of Congress of 1854, the Surveyor General of New Mexico had "the authority to report, not only on the validity of the original grant, but to decide who was the claimant to whom the grant was to be confirmed by Congress, and to whom a patent was to be issued."

The Supreme Court of the United States, however. in construing the powers of the Surveyor General under this Act of 1854, denies any such authority to the Surveyor General.

In the case of Pinkerton v. Ledoux, 129 U. S. 346-355; 38 L. ed. 708, the court said on this specific point:

> "The Surveyor-General's report is no evidence of title or right to possession. His duties were prescribed by the Act of July 22, 1854, before referred to, and consisted merely in making inquiries and reporting to Congress for its action. If Congress confirmed a title reported favorably by him it became a valid title; if not, not. So with regard to the boundaries of a grant; until his report was confirmed by Congress, it had no effect to establish such boundaries, or anything else subservient to the title."

If the Surveyor General did report to Congress, recommending the confirmation of a particular grant to a particular individual, and if Congress did confirm that grant as reported, of course, such Act of Congress would vest a title in the person named.

But in regard to the Las Vegas Grant, the Surveyor General, in the first place, did not recommend the confirmation of that grant to any claimant, for the reason that the town of Las Vegas claimed it on the one hand, and the heirs of Baca, or some of them, claimed it on the other hand. He made no recommendation, except that he found that a valid grant had been made to someone, and he left it to Congress to determine to whom that particular grant should be confirmed; and Congress solved that problem by confirming that particular grant to the town of Las Vegas; and then Congress gave to all the heirs of Luis Maria Baca the right to select other lands, because, as stated in the report of the Senate committee, referred to by counsel in their brief, the heirs of Baca were willing that that should be done.

We therefore submit, that the Grant of 1860, to make selection of five tracts of land, was given to all the heirs of Luis Maria Baca; and it is for this Honorable Court, on this present appeal, itself to determine, whether the descendants of the deceased son Antonio Baca were such heirs.

If, therefore, Antonio Baca, or his heirs, he having died before his father, were heirs of Luis Maria Baca, then, as such heirs, they were amongst the grantees under the grant made by the Act of Congress.

The lower court found and decreed that Antonio Baca was a son of Luis Maria Baca, who dying left a son, who dying left a son and daughter; and the children of this son and daughter have conveyed their interest in-

herited from Luis Maria Baca, to Joseph E. Wise and Margaret W. Wise, the present owners in fee thereof. The evidence, as we have shown, support the findings and decree.

We submit this decree, as to this 1-19 interest, should be affirmed.

Respectfully submitted,

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